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Responses to the Ten Questions

Wayne McCormack

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RESPONSES TO THE TEN QUESTIONS

Wayne McCormack[†]

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INTRODUCTION

I have chosen to address several, but not all, of the questions for this forum because I want to talk about the role of lawyers and national security. I believe that the policies of the U.S. Government following 9/11 were shaped by panic, that several of those policies

[†] E. Wayne Thode Professor of Law, University of Utah.

constituted an attempt to repudiate centuries of developing legal principles, and that the principles so repudiated represented both human values and pragmatic realities in the face of serious threats to national security. In short, I believe that the Bush administration, acting through various lawyers, mounted not so much a “War on Terror” as an assault on the rule of law.

Until sometime in the latter stages of the Bush administration, I blithely assumed that the excesses of that administration would be pulled back as professionals took over from the political appointees and that legal norms would reassert themselves by consensus. I thought the notion of a “war” on a concept would dissipate in the face of both military and political realities. I was wrong. Then I thought that the Obama administration would firmly and forcefully repudiate the policies of the prior administration. Wrong again.

I would not be writing this if the promise to close Guantanamo had been fulfilled, if there were a clear ringing statement that criminal offenses were committed in the name of the United States, or if the United States was not at war with any concept or philosophy. But none of this has happened. Not only have most of these policies been allowed to lie dormant, the architects and authors of the abuses continue to tout their positions and glamorize their war.

What did this war consist of? Abu Ghraib and prisoner abuse turns out to have been a calculated strategy fueled by “legal opinions” that were travesties. Detentions without hearings became commonplace. Renditions of prisoners from one foreign country to another where they would be mistreated were frequent and authorized by the President himself. The National Security Agency was authorized by the President to spy on U.S. citizens, at least when they were communicating with a person suspected to have terrorist ties, but maybe in other undisclosed circumstances also.¹ Congress was then enlisted to ratify the detentions without direct judicial oversight.

Rather than emphasizing the lapses of those in political positions, I would rather spend my energies praising courageous lawyers, particularly those in the military, who have challenged detentions and mistreatment of prisoners to the detriment of their careers. There were professionals in the Department of Justice who likewise challenged the excesses of the Bush administration. But the sad truth is that they were overwhelmed by political appointees who had less

1. Alberto Gonzales’s justification of the NSA surveillance program frequently referred to it as “the program that the President has disclosed,” generating the inference that there is more that has not been disclosed.

experience and less confidence in the ability of their nation to succeed under the rule of law.

My approach to some of the questions in this forum will illustrate some aspects of a very sad period in U.S. history. The arguments used in the two memoranda employ two “lawyer tricks” that I want to highlight: use of an overly vulnerable strawman and the answering only of the question asked. These are the tricks by which some lawyers facilitated the assault on the rule of law.

1. WOULD PRESIDENT OBAMA HAVE THE AUTHORITY TO HOLD A U.S. CITIZEN WITHOUT CHARGE IN A MILITARY BRIG FOR SIX MONTHS IF THAT CITIZEN—WHO LIVES IN MINNESOTA—IS SUSPECTED OF LINKS TO AL QAEDA FOLLOWING A ONE-MONTH TRIP TO SOMALIA?

No-duh. Not since the Magna Carta has the Executive claimed an unbridled discretion to detain a citizen. King John promised that no citizen would be imprisoned except by “lawful judgment of his peers or the law of the land.”² Indeed, the Due Process Clause does not distinguish between citizens and others, so even if the person in the hypothetical were an illegal alien, due process would attach. The niceties of due process for aliens, including detention of aliens pending deportation, are for another day, but the point here is that there is no authority—none—for unreviewed executive detentions of a U.S. citizen or anyone else arrested on U.S. soil. That is so clear that it even produced the unheard-of collaboration of Justice Scalia and Justice Stevens in a single opinion.³

The war on the rule of law was aptly illustrated by the “rendition” of Jose Padilla for trial when his habeas corpus claim was granted certiorari by the Supreme Court. This came after his application was kicked from New York to South Carolina, granted by the district court, denied by the Fourth Circuit, by which time he had been held in solitary confinement with no judicial review for nearly four years. How can this be considered to be in compliance with our own Due Process Clause, let alone with any number of international human rights provisions? It also illustrates the contempt with which the

2. Magna Carta art. 29 (1215) (“No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgment of his peers or by the law of the land. To no-one will we sell or deny of delay right or justice.”).

3. Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting, joined by Stevens, J.).

administration tended to treat the judiciary—deciding not to give the Supreme Court a chance at an obvious violation of law.⁴

All I can think of to discuss on this issue are two questions: (1) why we put so much stock in the prospect of judicial review and (2) whether it is permissible to engage in preventive detention of dangerous people. On the first question, do we think that judges are better than executive officials at determining the propriety of incarceration? Not at all; the difference is in their assigned roles. The executive has the obligation of detecting, investigating, and charging antisocial behavior, while judges have the obligation of reviewing those determinations from a neutral oversight position—it's about checking, not about respective abilities. On the second question, it is true that dangerousness can be considered in the context of health quarantines, mental illness and pretrial incarceration, but that's it.

Hundreds of years of experience, including experience under perilous circumstances, have gone into the universal condemnation of preventive detention. Indeed, it is precisely because perilous circumstances have shown the need for a neutral checking function that the notion of judicial review has arisen. To concede another point, although our Due Process Clause has never been read to allow for abrogation of review even in times of war,⁵ the international conventions do allow for abrogation of some rights under “emergency threatening the life of the nation.”⁶ That leads to the question of whether terrorists represent an existential threat to the United States, dealt with below.

4. The Fourth Circuit held that Padilla was an “enemy belligerent” who “associated with the military arm of the enemy, and with its aid, guidance, and direction entered this country bent on committing hostile acts on American soil.” *Padilla v. Hanft*, 423 F.3d 386, 392 (4th Cir. 2005). But these “facts” were based on a stipulation by the petitioner’s counsel for purposes of a summary judgment motion—they were never subjected to a neutral fact-finder’s review. *Id.* at 390 n.1. Further, the claim that he entered the country to explode a “dirty bomb” was dropped at trial.

5. *Korematsu v. United States*, 323 U.S. 214 (1944) was followed by *Ex parte Endo*, 323 U.S. 283 (1944). “The authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted at least when his loyalty is conceded.” *Endo*, 323 U.S. at 302.

6. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 15, 213 U.N.T.S. 221, 235 (entered into force Sept. 3, 1953) [hereinafter European Convention on Human Rights].

3. DID MEMBERS OF THE JUSTICE DEPARTMENT'S OFFICE OF LEGAL COUNSEL COMMIT MALPRACTICE IN 2002 BY ADVISING THAT THE GENEVA CONVENTIONS DID NOT APPLY TO AL QAEDA AND THE TALIBAN?
4. DID MEMBERS OF THE JUSTICE DEPARTMENT'S OFFICE OF LEGAL COUNSEL COMMIT MALPRACTICE IN 2002 BY ITS WRITTEN GUIDANCE TO THE CENTRAL INTELLIGENCE AGENCY ON INTERROGATION STANDARDS?

These two questions coalesce for me into questions about the competence and good faith of a number of persons in positions of authority. The two memoranda—the so-called Torture Memorandum⁷ and the Geneva Memorandum⁸—are profoundly disturbing. I am not personally qualified to reflect on the issue of whether the authors violated the Model Rules of Professional Conduct. My limited understanding of the rules is that I may not advise a client on how to violate the law. I can see that, as a disciplinary matter, the authors may well have thought they were providing an explication of the law rather than methods to evade it.⁹ But any sound principles of ethics go well beyond that limited notion, and most of us are fully competent to address the attitudes displayed in these memoranda. The two memoranda need to be read in a context of multiple departures from transparency and accountability. Even if plausible arguments can be made for each opinion separately, the composite shows a fundamental contempt for the values of democracy. Democracy posits that power flows up from the people, not down from the executive. The Office of Professional Responsibility (OPR) staff report found

7. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzalez, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), *available at* <http://fl1.findlaw.com/news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf> [hereinafter Torture Memorandum].

8. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzalez, Counsel to the President, and William J. Haynes II, Gen. Counsel of the Dep't of Def., Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf> [hereinafter Geneva Memorandum].

9. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2007) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.").

professional misconduct by the drafters of the “torture memos” in their failure to observe two professional duties: the duty to exercise independent judgment and the duty to provide “thorough, candid, and objective analysis.”¹⁰ The Associate Deputy Attorney General reviewed the OPR findings and disagreed, stating that the drafters in his view merely exercised “poor judgment.”¹¹ How the principal author can now describe this as “vindication” is a total mystery.

The apologia for these policies tends to focus on the need for extraordinary powers in extraordinary times, citing examples from the presidencies of Washington, Jefferson, Jackson, Lincoln, and Roosevelt. Historian Jack Rakove raises a “deep objection” to the idea of unrestrained executive prerogative, emphasizing the need for legislative checking.¹²

10. DEP’T OF JUSTICE OFFICE OF PROF’L RESPONSIBILITY, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 260 (July 29, 2009).

11. Memorandum from David Margolis, Associate Deputy Att’y Gen., to the Att’y Gen. and the Deputy Att’y Gen., Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report of Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists 68 (Jan. 5, 2010), *available at*

<http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf>.

12. Jack Rakove, *Book Review of John Yoo’s ‘Crisis and Command,’* WASH. POST, Jan 10, 2010, at B1. Rakove objects to

Yoo’s use of the idea of prerogative—the notion that the government must possess some discretion to deal with threats no one can ever fully anticipate. Here Yoo relies on John Locke’s famous chapter on prerogative from his “Second Treatise” (1690), the revolutionary work that justified the right of a people to overthrow tyranny and establish a new government. The people, Locke suggested, would rightly trust the executive to use prerogative wisely, and if they agreed with his purpose, they would cut him slack on the constitutional side, understanding why the benefits sometimes outweighed the costs. But the question of whether the prerogative was broad or narrow remained, Locke thought, a matter of legislative supervision, always subject to a review that Yoo, with his deep distrust of Congress, finds alarming.

There is, in short, a tension that Yoo does not wholly resolve between underlying republican values and the virtues of presidencies that he champions. The great lesson of this past decade of misrule has been that our system works best when all three institutions are fully engaged. However much we celebrate the heroic presidents, Americans, as a people, have a stake in seeing the whole government achieve its potential. Yet what Yoo forces us to confront is the reality of all the striking advantages the executive enjoys. It is, in its way, an enticing portrait of presidential power—and a disturbing one.

I want to make another fundamental objection: none of the examples of presidential behavior from prior administrations involved a systematic defiance of law. Justice Jackson's famous analysis in *Youngstown Sheet & Tube* pointed out that the President is on weakest footing when acting in contradiction of congressional decisions but that the President might have constitutional authority apart from congressional authority.¹³ Jackson, however, did not contemplate a systematic defiance of the type we saw in 2002 through 2008. Despite my preference for a holistic approach, I will take the two memoranda separately. The Geneva Memorandum has been subjected to much less commentary than the Torture Memorandum, probably for two reasons. It involves a more elaborate legal argument and it does not so obviously and tangibly result in graphic photos of mistreated human beings. That it led to those practices, however, should not be overlooked, and its importance in the war on the rule of law should not be discounted.

The Geneva Memorandum does acknowledge that there is not just one but four Geneva Conventions and that customary international law, as embodied in various other international conventions, may have some bearing on the treatment of persons detained by a foreign power (i.e., a political entity not the country of that person's nationality). The Third Geneva Convention on Treatment of Prisoners of War (GIII) sets out criteria by which to judge whether a person in the hands of a party to an armed conflict shall be entitled to what its critics refer to as the "gold standard" treatment. The Memorandum states, cogently enough, that al Qaeda functionaries could not claim protection under GIII because al Qaeda is not a state signatory.¹⁴ It presents a reasonable argument that the Taliban government constituted a "failed state" that did not succeed to the

Id.

13. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id.

14. Geneva Memorandum, *supra* note 8, at 9–10.

legitimate status of a party to the Conventions.¹⁵ Okay, that's a bit of a stretch but let's let it go for the moment. The central theme of that part of the Memorandum is that the Conventions do not apply because neither al Qaeda nor the Taliban was a party to the Conventions.

The Memorandum accepts the executive's promise that detainees are to be treated "consistent with" GIII, concedes that the conditions at Guantanamo may not meet all the technical requirements of GIII, but argues that any deviations are justifiable.¹⁶ Again, none of this is terribly controversial given the executive's factual assertions regarding treatment of the detainees.¹⁷

The critical flaws of the Geneva Memorandum do not show up until the assertion that customary international law can be ignored by the President at his prerogative.¹⁸ The Memorandum does not detail what aspects of customary international law it is addressing. Basic elements of due process are the easiest to understand—the notion that a person in custody has some right to a determination by a neutral decision-maker that he is rightfully in custody is not just a notion of U.S. law but is contained within customary law as exemplified by the Universal Declaration of Human Rights (UDHR).¹⁹ As a technical matter, the UDHR language applies to criminal charges, and the initial stages of executive detentions in 2002 did not contemplate the bringing of charges—but if the detainees were neither criminal suspects nor engaged in an armed conflict, then what were they?

That leads to the most fundamental flaw, which runs throughout these as well as other memoranda of the era: the notion that someone

15. *Id.* at 15–22.

16. *Id.* at 28.

17. "This means that they are housed in basic humane conditions, are not being physically mistreated, and are receiving adequate medical care." *Id.* For purposes of the current discussion, we can assume that none of the lawyers in the Justice Department had any information to the contrary. There were FBI agents (part of the Justice Department) who objected early to the treatment of prisoners at Guantanamo, but these objections were not registered until after the memoranda were written. Whether those objections should have resulted in withdrawal of all or part of the memoranda is certainly debatable.

18. *See id.* at 32–37.

19. UDHR articles 9–11 protect against "arbitrary arrest, detention, or exile," assure "everyone . . . a fair and public hearing . . . of any criminal charge," and a presumption of innocence along with "guarantees necessary for his defence." Universal Declaration of Human Rights, arts. 9–11, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 72, U.N. Doc. A/810 (1948).

could be declared by unilateral executive edict to be an “unlawful enemy combatant” and cease to be a person within international law. The phrase “unlawful enemy combatant” stems from *Ex parte Quirin*,²⁰ which dealt with eight German saboteurs who had been convicted of war crimes by a military commission. The relevant factors in determining their status were that they were tried in a hearing with legal representation, they admitted to (or were found with solid evidence of) having been agents of a nation with which the United States was formally in a state of war, and that they had taken steps to commit acts of violence without following the laws and customs of war (e.g., failing to wear a uniform). By contrast, prior to the CSRT determinations that were created following *Hamdi* in 2004, nobody at Guantanamo had been the subject of any determination whatsoever, let alone the type of trial contemplated by the UDHR.

Unilateral executive detentions are anathema to the rule of law. It is true that Geneva IV and customary international law allow for removal of civilians from the theater of armed conflict either for their own safety or to eliminate security threats during military operations. But that is a limited power of relocation based on status that bears no relationship to indefinite detention based on a person’s alleged behavior.

Finally, the Memorandum argues that customary international law, without describing what that law might be, is not binding on the President. Stated that way, the proposition is not terribly exceptional—customary international law can be ignored or repudiated by any nation, albeit at some peril to significant international relations. The Memorandum’s “spin” on customary international law, however, uses a device that first-year law students are usually urged to forgo: the vulnerable strawman. The Memorandum characterizes the arguments for incorporating customary international law into domestic law: “this position often claims that the federal judiciary has the authority to invalidate executive action that runs counter to customary international law.” Having established this strawman, the Memorandum goes on to blow it over with arguments that are mostly salient. For example, it is easy to agree that “allowing the federal courts to rely upon international law to restrict the President’s discretion to conduct war would raise deep structural problems.” Again, stated that way, the proposition is not terribly exceptional.

20. 317 U.S. 1 (1942).

But it is highly unlikely that anyone would urge federal courts to issue injunctions against commanders in the field on the basis of customary international law. That is not what the proponents of incorporation put forward. Now is neither the time nor place to engage in a discourse on the nature of customary international law, but suffice to say that its enforceability by domestic courts is not the touchstone of either its validity or its importance. By simplistically answering only a very simple question, the Memorandum seriously misleads an unsophisticated reader into thinking that customary international law is irrelevant to the mission of the U.S. military. That position itself places the military in a very awkward position with regard to other nations, a matter that the Memorandum blithely ignores.

With regard to the Torture Memorandum, Dean Koh listed five obvious failures: omission of universal obligations, absurd narrowing of the definition of torture, over-reading the power of the President, an erroneous reliance on a defense of superior orders, and failure to recognize the illegality of inhuman or degrading treatment.²¹ I won't examine Dean Koh's catalog at length here, but a little discussion is relevant to my point about the assault of the rule of law.

Most Americans are familiar with the horrifying images from cell blocks 1A and 1B at Abu Ghraib. If there had been no lead-in to these events, perhaps they could have been handled as aberrations. But it is now clear that Abu Ghraib was on—and we can only hope at the bottom of—a slippery slope created at the highest levels of government. The most benign explanation of the debacle is that it began as marginal levels of improper interrogation for those who might have had some knowledge of terrorist organizations and then expanded outward until it became impossible to control in the field absent firm and aggressive action that was sorely lacking. A more likely explanation is that it had nothing to do with obtaining intelligence at all; we now know that it was based on the SERE techniques designed to deal with torture, not interrogation.

Regardless of the motivation, the abuse policies reflected a cli-

21. *Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States: Hearing Before the S. Comm. of the Judiciary*, 109th Cong. 4 (2005), available at <http://www.law.yale.edu/documents/pdf/KohTestimony.pdf> (prepared statement of Harold Hongjiou Koh, Dean, Yale Law School).

mate of emergency excuse during 2002 and 2003,²² during which it became increasingly acceptable to treat prisoners in ways that had no justification under either domestic or international law.²³ There were objections at the time from professionals in both Defense and Justice, but now the public trust and our international standing demand statements in no uncertain terms that these positions were utterly unacceptable for a public official.²⁴

The Torture Memorandum attempted to legitimize abusive interrogation techniques at two levels. At the first level, the Memorandum argued that some techniques constituting “cruel, inhuman or degrading treatment” would not violate the Convention against Torture or its implementing statutes.²⁵ At the second level, arguments were made that even torture could be excused either because military actions in wartime are not subject to the requirements of law or that “necessity or self-defense” could justify what would otherwise be illegal

22. A catalogue of the memoranda addressed to methods of interrogation can be found at <http://www.washingtonpost.com/wp-dyn/articles/A62516-2004Jun22.html>.

23. General Taguba’s report in March 2004 specifically found “[t]hat between October and December 2003, at the Abu Ghraib Confinement Facility (BCCF), numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees. This systemic and illegal abuse of detainees was intentionally perpetrated by several members of the military police guard force.” Maj. Gen. Antonio Taguba (Ret.), U.S. Army Article 15-6 Investigation of the 800th Military Brigade, Part I, ¶ 5, *available at* <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html>. “Given the known facts, the notion that the photographed outrages at Abu Ghraib were just the actions of a few sick men and women, as President Bush has repeatedly argued, is beyond belief.” Anthony Lewis, *Making Torture Legal*, N.Y. REV. OF BOOKS, July 15, 2004, at 2.

24. *But see* Andrew McCarthy, *It’s the Enemy, Stupid*, NATIONAL REVIEW (2010), http://www.defenddemocracy.org/index.php?option=com_content&task=view&id=11787762&Itemid=0. The following rant is from a lawyer, a successful prosecutor of terrorist conspirators who makes the case for enhanced interrogation:

Yes, the Left will say you are making a mockery of our commitment to ‘the rule of law.’ . . . So what? The people making these claims don’t speak for Americans—they speak at Americans, in ever shrinking amounts. If you’re going to cower from a fight with them, we don’t need you. . . . The laws of war are the rule of law. They are not a suspension of the Constitution. They are the Constitution operating in wartime. . . . The American people understand that we have enemies . . . Americans also grasp that war is a political and military challenge that the nation has to win, not a judicial proceeding in which your enemies are presumed innocent. The rule of law is not and has never been the rule of lawyers—especially lawyers we can’t vote out of office when they say we must let trained terrorists move in next door.

Id. What has happened to our profession?

25. Torture Memorandum, *supra* note 7, at 14–22.

conduct.²⁶ These arguments are so outrageous that commentators have had a bit of a field day with their implications.²⁷

At the first level, it is true that the Convention Against Torture commits a signatory nation to criminalize only torture, while the International Covenant on Civil and Political Rights (ICCPR) and UDHR ban both torture and “cruel, inhuman or degrading treatment.” United States criminal law punishes only torture. From this distinction, it can be argued that there is nothing criminal about “cruel, inhuman or degrading treatment,” and it is on this basis that the Memorandum proceeds. There are a number of treaty obligations containing restrictions on torture or cruel, inhuman or degrading treatment, not just the Torture Convention or the Geneva Conventions. Both the UDHR and the ICCPR contain the same language. Even were the United States not a party to those conventions, they express a fundamental postulate of customary international law, part of the minimum standards to which all nations subscribe.

Some well-known interrogation techniques (stress positions, sleep deprivation, hooding, and food deprivation) were labeled by the European Court of Human Rights as constituting not torture but “cruel, inhuman or degrading treatment.”²⁸ That does not make them legal, however. It leaves them illegal under provisions of both domestic²⁹ and international law³⁰ other than the Torture Convention and its statutes. The Memorandum fails to point out that “cruel, inhuman or degrading treatment” would violate not only the Eighth Amendment but also the obligation under the Convention to “prevent” those acts. In other words, the United States has obligated itself as a matter of law to prevent an array of actions in addition to those that are criminalized under the Torture Statute.

Taken alone, perhaps this was not a direct assault on the rule of law so much as a turning of a blind eye to some requirements of law. But one of the worst “lawyer tricks” is to answer only the question

26. *Id.* at 31–46.

27. “The memos read like the advice of a mob lawyer to a mafia don on how to skirt the law and stay out of prison.” Lewis, *supra* note 23, at 1.

28. Republic of Ireland v. United Kingdom, 2 Eur. Ct. H.R. 25 (ser. A) (1978).

29. A host of statutes, including the Uniform Code of Military Justice, criminalize excessive use of force by federal officers charged with custody of prisoners.

30. The United States is a signatory to the Covenant on Civil and Political Rights, which condemns both torture and “cruel, inhuman, or degrading treatment or punishment” in the same language as the European Convention on Human Rights which the ECHR interpreted in the *Ireland* case.

asked, knowing that the answer should lead to another pertinent question that has not been asked, and in context with everything else, the Memorandum reflects the pervasive climate of fear and evasion that prevailed at the time.

At the second level, it is sheer nonsense to argue that defense of the nation could rise to the level of an excuse to justify departure from norms that are designed for the very situation of persons in custody during a time of emergency. The Torture Convention spells this out in excruciating detail: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability, or any other public emergency, may be invoked as a justification for torture.”

The Memorandum also makes the rather unexceptional point that the Constitution vests the President with the commander-in-chief power and that the Supreme Court has recognized that the executive has a “unity in purpose and energy in action” that makes it better suited to conduct the strategy and tactics of warfare.³¹ The military has the obligation to capture, detain, and interrogate enemy combatants (and, we could add, criminals such as terrorists) to obtain valuable information to prevent further harm. Again, so far so good. But then the Memorandum makes this astonishing leap:

Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President. . . . Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.³²

Wow. The Uniform Code of Military Justice is unconstitutional? It is unconstitutional for Congress to authorize military force against nations that harbor terrorists? It is unconstitutional for the Senate to ratify treaties prohibiting war crimes and cruel, inhuman, or degrading treatment of prisoners? And it was even unconstitutional for Congress to authorize and set goals for the invasion of Iraq? If the

31. For this proposition, the Memorandum cites a number of cases with dicta to the effect that the President is better suited than Congress to conduct military operations. The Memorandum does not cite cases such as *Youngstown* or *Milligan* that place restraints on the presidential powers. Torture Memorandum, *supra* note 7, at 34–35.

32. *Id.* at 39.

Torture Memorandum had suggested any limits on its sweeping statement of presidential autonomy, then it might be possible to address it seriously. As it stands, however, it is impossible to imagine what the limits might be and thus impossible to describe these conclusions as anything but ludicrous.

The final level at which the Torture Memorandum operates is to put forward potential defenses of necessity or “defense of others” that could be raised in criminal prosecutions under the torture statutes. The Torture Memorandum recognizes the argument that the defense of necessity is not available with regard to any offense in which the legislative body has already made the decision that there shall be no defense. The Torture Convention contains the provision that “no exceptional circumstances whatsoever . . . may be invoked as a justification of torture.”³³ The Torture Memorandum responds to this by pointing out that this provision was not enacted into the U.S. Code, so because “Congress omitted CAT’s effort to bar a necessity or wartime defense, we read Section 2340 as permitting the defense.”³⁴ It is much more plausible to believe that Congress did not enact it because it was already part of the framework of the statute. Moreover, just because a defense might be allowed under domestic law does not make that defense available in any setting other than domestic courts.³⁵ The Torture Memorandum opens a U.S. interrogator to prosecution by another signatory nation, or possibly by any nation under the doctrine of universal jurisdiction,³⁶ in which the defense

33. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2.2, *adopted* Dec. 10, 1984, 100 Stat. 382, 1465 U.N.T.S. 85 (CAT).

34. Torture Memorandum, *supra* note 7, at 41 n.23.

35. United States courts typically take the view that Congress’s statutory law stands on a higher footing than a treaty where the two conflict. Although some treaties are self-executing, most will require some legislative action to put their provisions into effect as domestic law. When Congress does act, it can decide to modify the terms of international law.

Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law. “Statutes inconsistent with principles of customary international law may well lead to international law violations. But within the domestic legal realm, that inconsistent statute simply modifies or supercedes customary international law to the extent of the inconsistency.”

United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (quoting Committee of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 938 (D.C. Cir. 1988)).

36. See generally *Ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147, (HL1999) (U.K.).

clearly would be unavailable. This seems irresponsible lawyering at best.

In addition to its sweeping rejection of Congress's role in law-making, the Memorandum's general tone ignores treaty law and *jus cogens* as limits on U.S. military or executive action. The authors profess to be aware that treaty obligations and *jus cogens* could be relevant to policy decisions but assert that they could not be operative legal constraints even in the absence of overt abrogation by the President or Congress.³⁷ The Bush administration has attempted to distance itself from the memorandum by stating that no decisions were ever made to implement its conclusions.³⁸ But the existence of the memorandum, unless it were clearly and firmly repudiated by higher levels than its authors, must have contributed to the climate of "emergency powers" that toppled the traditional constraints on prisoner treatment like dominos from "undisclosed locations" to Guantanamo to Abu Ghraib.³⁹

Finally, there is nothing in this whole line of thought to suggest

37. Torture Memorandum, *supra* note 7, at 14–20; *see also* International Law of War Association, Torture Memos Analysis, http://lawofwar.org/Torture_Memos_analysis.htm (last visited June 25, 2010) ("This argument presents an interesting question of domestic law as to whether a Commander in Chief can order a violation of international law by making a factual finding unsupported by independent evidence. Could one charged under the War Crimes Act (18 U.S.C. § 2441) assert as a defense that as a matter of domestic law there was no grave breach, even though it was clearly a violation of international law? The answer to that proposition is beyond the scope of this discussion, although it appears questionable. What the argument does not do, however, . . . is present any defense to charges by any other Geneva III signatory charged to prosecute perpetrators of grave breaches wherever they may be found.").

38. *See, e.g.*, Mike Allen and Dana Priest, *Memo on Torture Draws Focus to Bush; Aide Says President Set Guidelines for Interrogations, Not Specific Techniques*, WASH. POST, June 9, 2004, at A03 ("White House Counsel Alberto R. Gonzales said in a May 21 interview with The Washington Post: Anytime a discussion came up about interrogations with the president . . . the directive was, [m]ake sure it is lawful. Make sure it meets all of our obligations under the Constitution, U.S. federal statutes and applicable treaties.") (internal quotations omitted).

39. *See, e.g.*, Reed Brody, *Prison Abuse Calls for 9/11-Type Probe*, HUMAN RIGHTS WATCH, Aug. 1, 2004, <http://hrw.org/english/docs/2004/08/02/usint9172.htm> ("The photos were followed by revelations that the use of illegal, coercive interrogation methods on detainees had been approved at the highest levels of government, and by evidence that abuse of detainees was widespread in both Iraq and Afghanistan. Yet only a few low-ranking soldiers have been called to account, and the administration is sticking to its line that the Abu Ghraib crimes were the work of a few 'bad apples.'").

that the policy makers ought to be immune from all consequences of clandestine authorization of illegal conduct. A claim of executive immunity leaves only the ultimate type of prosecutorial discretion, namely the response of the voters at the next election. A good government lawyer knows that legal advice includes the observation that the client should not do something that he/she does not want to read the next day in the *Washington Post*. At a minimum, the American military, the American public, and the world citizenry are all entitled to know that the United States stands behind the rule of law. A reaffirmation of our commitment to existing law is a minimal step in legitimating our claims of legal authority for future actions.

7. HOW DO THE ABUSES OF CIVIL LIBERTIES UNDER THE GEORGE W. BUSH ADMINISTRATION COMPARE TO THE INTERNMENTS OF JAPANESE ALIENS AND JAPANESE-AMERICANS DURING WORLD WAR II?

They hardly compare at all—that is the thrust of my position regarding the war on the rule of law. That is not to say that the Japanese internments were appropriate, but just that the Bush administration went far beyond any one questionable action. Lincoln had his executive detentions and suspension of the writ. FDR had the Japanese internments. Various Presidents, including Jefferson and Jackson, have asserted their authority to make independent judgments about constitutional matters and various arguments have been forwarded in favor of implied or inherent presidential powers.

None of those arguments, however, contemplates the kind of arrogant, almost contemptuous, claims put forward during the Bush years that the President was above and beyond the law. Not since the Magna Carta has the British monarch claimed to be superior to the law, and nothing in U.S. history plausibly supports that wide-reaching claim.

8. DOES AL QAEDA POSE AN EXISTENTIAL THREAT TO THE UNITED STATES?

Yes, if we elect officials who are weak or, in the words of Lord Hoffman, “too fragile or fissiparous to withstand a serious act of terrorism.”⁴⁰ No, if we stand up for our principles. If we allow the

40. *A v. Sec’y of State for the Home Dep’t*, [2004] UKHL 56, [2004] All ER (D) 271 (2004):

95. [T]he question is whether such a threat is a threat to the life of the nation. . . . Of course the government has a duty to protect the lives and

bad guys to change our way of life, then they win. The terrorist mindset seems to be “I can’t defeat you, but I can help you commit suicide.” The point being that one strategic goal of the terrorist tactic is to cause the opposition to over-react. Over-reaction leads to loss of support for the existing regime and eventually to a withdrawal from the fray. The strongest protection of our national security is to stand firmly against the threats, true to our principles, so that everyone can see what the nation stands for.

10. WHEN WILL THE UNITED STATES CEASE TO BE THE WORLD’S
NUMBER-ONE POWER?

As soon as we realize how much better off we will be without that albatross around our neck. In the fall of 2001, the United States had an opportunity unique in all of human history. One nation clearly dominated the world in both power and prestige. Almost the entire globe was of one mind to confront the cowardice of attacks on civilians. There was even an awareness within the decision elites of the world that something needed to be done to address the globalization of labor and the movement of capital. The goodwill of the entire world was focused on the United States and its leadership. That goodwill provided an opportunity to reshape how the world goes about its political business, but instead the leadership of the United States squandered that good will and that opportunity.

property of its citizens. But that is a duty which it owes all the time and which it must discharge without destroying our constitutional freedoms. There may be some nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom. When Milton urged the government of his day not to censor the press even in time of civil war, he said:

Lords and Commons of England, consider what nation it is whereof ye are, and whereof ye are the governours.

96. This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hider hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.
